

**REALISAING STRATEGIC ALLIANCE
GOALS THROUGH FRANCHISING:
CONCEPTS, LEGAL REQUIREMENTS
AND CONSTRAINTS**

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REALISAING STRATEGIC ALLIANCE GOALS THROUGH FRANCHISING: CONCEPTS, LEGAL REQUIREMENTS AND CONSTRAINTS.

Introduction:

This paper shall attempt to answer the following questions:

- (i) What is franchising and how has this concept and practice affected the growth of trade and investment?;
- (ii) In the case of Nigeria, what has been the response of the Law to the rapid development and expansion of this concept and practice, particularly, in the face of globalisation?;

Specifically,

- (a) Are there legislative provisions in this respect and in what ways (if any) has the Nigerian Judiciary built on precedents in this respect.
- (b) If there are no substantial existing legislations and judicial precedents on the point, what is the way out for Nigeria since the country is an active player in trade and investment in sub-Sahara Africa, at least, by virtue of the country's size, population and lead roles in the affairs of the sub region, particularly those bordering on economic co-operation and integration?.
- (iii) What Legal steps/procedures should an entrepreneur take in obtaining a franchise agreement and what really should the agreement contain?
- (iv) Suggestions on the imperatives of developing a franchise code for Nigeria, establishing a Franchise Association and fostering of best practices to meet international standards.

- (v) Comparative legal developments from other jurisdictions, lessons for Nigeria and need to ensure conducive investment atmosphere and effective policy processes that will engender confidence on investors.

The answers to the above questions (and more), shall be attempted in the course of this paper.

Globalization, Meaning and Concept of Franchise

As has been observed elsewhere¹, today's World is witnessing two great revolutions: the reshaping of economic life through globalisation with enhanced technological developments and the projection of democratic governance, resulting in fertile political and social grounds for improved trade and investment. Globalisation fosters competitiveness, commitment and competence. It has become the best language for describing changing market realities. One formidable method of meeting the demands of the changing market realities is by utilizing the benefits which Strategic Alliances offer. Corporations are now compelled to restructure their businesses in order to ensure efficiency, reduce costs, minimize risks involved in the business venture, combine strengths, transfer technology, fight competition in acceptable business-like fashion and even leverage scarce resources. One sure way of realizing strategic alliance goals in order to take benefits of the above is through *franchising*.

Specifically, an x-ray of the concept will show that:

1. An entrepreneur (franchisor) will not need vast sums of capital to establish distribution network;
2. one party (franchisee) will enjoy the benefit of another's (franchisor's) expertise;
3. one party (franchisor) will enjoy the benefit of another's (franchisee's) local management potentials;
4. one party (franchisor) will enjoy the benefit of less political bias while one party (franchisee) will be smiling for bringing in foreign investment into his country or locality; and

¹ J. U. K. Igwe, 'Strategic Alliances, Globalisation and Democracy in Strategic Alliances', In International Business.

5. one party (franchisor) will enjoy the benefit of not having to supervise marketing activities so many kilometers away while another (Franchisee) will enjoy the control in his local environment of the goodwill and or in appropriate cases, the technical know-how of another.

The franchising concept, developed in the United States, now accepted all over the world, has become a well-known method of doing business. It encompasses accumulation of *intellectual property rights* owned by franchisor which the franchisor licenses to the franchisee under terms which require the franchisee to follow exactly the franchisor's methods of doing business. It is a business system licensed to the franchisee for a number of years. Intellectual property covers that body of legal rights which arise from mental and artistic endeavours. These include: copyrights, trademarks, patents and designs.

Curiously, Nigerian Law has focused on specific direct protections of these forms of intellectual properties as well as a monitoring mechanism for foreign technology transfer to Nigeria without meeting international developments in specifically providing Laws and regulations on franchising. In Europe, America and Asia, Franchising Associations now exist devoted to the growth and expansion of franchising.

In Britain for example, the franchising Association has defined franchising as:²

‘a contractual licence granted by one person (the franchisor) to another (the franchisee) which’:

- (a) permits or requires the franchisee to carry on during the period of the franchise, a particular business under or using a specific name belonging to or associated with the franchisor; and
- (b) entitles the franchisor to exercise continuing control during the period of the franchise over the manner in which the franchisee

carries on the business which is the subject of the franchise; and

- (c) obliges the franchisor to provide the franchisee with assistance in carrying on the business which is the subject of the franchise (in relation to the organization of the franchise's business, the training of staff, merchandising, management or otherwise); and
- (d) requires the franchise periodically, during the period of the franchise, to pay the franchisor sums of money in consideration for the franchise, or for goods or services provided by the franchisor to the franchisee; and
- (e) which is not a transaction between a holding company and its subsidiary (as defined in Section 736 of the Companies Act 1985) or between subsidiaries of the same holding company; or between an individual and a company controlled by him.'

In Italy, the *Associazione Italiana del Franchising* which is the Italian franchising Organization has given the following definition of franchising³.

“Franchising – *Affiliazione commerciale*-is a form of continuous collaboration for the distribution of goods or services between an Entrepreneur (Affiliante) and one or more Entrepreneurs (Affiliate) juridically and financially independent one from the other who enter into an agreement through which:

- (a) the Affiliator grants to the Affiliate the utilization of its commercial formulae including the right to exploit its know-how

³

Contard; Fulgon and Pandareresse in Italy, Commercial Agency and Distribution Agreements, Law and Practice In the Member States of the European Union (Guy-Martial Weijer ed), Graham & Trotman, P351.

(all techniques and knowledge necessary) and its distinctive signs together with other services and forms of assistance which permit the Affiliate to manage his business in the same image as that of the Affiliator.

(b) The Affiliate undertakes to adopt the Affiliator's commercial policy and image in the reciprocal interests of the parties themselves and the final consumer as well as to respect contractual conditions which have been fully agreed."

The term "*Affiliazione*" has been used in Italy to evidence the relationship between the franchisor and the franchisee.

Also, definitions on franchising have been proffered by the Belgian Franchising Association⁴, the French Federation of Franchise (F.F.F) to mention a few. The Associations have drawn up rules governing the conduct and ethics of members involved in franchising. A similar Association is recommended for Nigeria. This will assist in organizing entrepreneurs interested in taking benefits of franchising, drawing up rules and ethical standards that will accord with international best practices. Now is the time to act. This challenge goes to all participants of this seminar and Entrepreneurs in Nigeria interested in utilizing the enormous potentials which franchising offer.

Kinds of Franchise

1. Manufacturing franchise

The major characteristics of this type of Franchise is that the franchisor manufactures the goods sold by his franchisee. The target usually, is for the franchisor to concentrate on the manufacturing of well known goods of good quality and to have them sold by franchisee who take the benefit of the well acknowledged goods of good quality.

⁴

See Belgian Code of Loyal Practice Concerning Franchising

2. Distribution Franchise

Some franchises take the form of distributorships. In this case, the franchisor does not manufacture the franchised goods. He purchases the goods from various independent suppliers and manages the sale through a franchise network created by him. It should be noted that distributorship franchise differs from ordinary distributorships to the extent of greater degree of control exercised by the franchisor over a franchisee (distributor). Every segment of a distributorship franchise is controlled. For example, provisions may be made that:

- (i) all units of the franchise outlets shall have the same sign and conform to a standard in their appearance
- (ii) identical sales policy applied to sale of similar goods controlled by the franchise.

In the *Prenuptia judgment*⁵ the European Court of Justice defined distributorship franchise agreements as contracts under which the franchisee simply sales certain products in a shop which bears the franchisor's business name or symbol.

Does Distributorship franchise infringe on Competition?

In the *Pronuptia case*⁶, the court answered the above question in the negative. Rather, it listed the advantages that will inure to entrepreneurs involved with this form of franchise. The court defined a *properly drafted* system of distribution franchises as a network of agreements whereby an undertaking which has established itself as a distributor on a given market and thus developed certain business methods, grants independent traders, for a fee, the right to establish themselves in other markets using its business name and the business methods which have made it rather successful.

Rather than a method of distribution, it is a way for an undertaking to derive financial benefit from its expertise without investing its own capital.

⁵ [1986] ECR 353; See also Yves Rocher decision (OJL 8/49 of January 10. 1987); Computer Land decision OJL 222/2 of 10 August 1987); Service Master decision (OJL 332/38 of December 1988) and Charles Jourdian decision (OJL 35/31 of Febraury 1989).

⁶ Supra.

Moreover, the system gives traders who do not have the necessary experience access to methods which they could not have learnt without considerable effort and allows them to benefit from the reputation of the franchisor's business name. Thus, the Court held that such a system which allows the franchisor to profit from his success, does not in itself interfere with competition.

However, the Court pointed out that in order for the system to work two conditions must be met:

- (i) the franchisor must be able to communicate his know-how to the franchisees and provide them with the necessary assistance in order to enable them to apply his methods, without running the risk that the know-how and assistance might benefit competitors;
- (ii) the franchisor must be able to take the measures necessary for maintaining the identity and reputation of the network bearing his business name or symbol.

Thus, provisions which are essential in order to avoid the risk and provisions which establish the means of control necessary for that purpose do not constitute restrictions in competition.

Thus, several jurisdictions are concerned on the possible impact on competition. However, the good news is that most jurisdictions regard franchise agreement rather favourably⁷.

Unfortunately, one gropes in a maze to find any legal development whether statutory or Judicial in Nigeria in this respect. The closest attempts appear to be the efforts by a member of the House of Representatives⁸ in sponsoring the ***Protection of Consumers from Deceptive Act and Practice Bill, 2001*** and the ***Trade and Commerce (Protection Against Restraints and Monopoly) Bill, 2001***.

However, so much input by experts should be encouraged before the promulgation of these Bills into Law as their present contents have not addressed the technical Legal nature of Competition/monopoly vis-à-vis preservation of rights under trade and investments.

⁷ See the decision of the European Union Court of Justice in Pronuptia (Supra) and Yves Rocher case (Supra).

⁸ Hon. Tony Anyawu

3. **Service Franchise**

This is an agreement under which franchisee offers services under the business name or symbol and sometimes the trademarks of franchisor in accordance with franchisor's instructions.

This type of franchise is still at its embryonic stages. It allows the franchisor to create a service formula which is granted to his franchisees who shall be in charge of repeating the formula in conformity with the franchisor's method.

4. **Industrial Franchise**

In this case, the franchisor gives to his franchisee his technical know-how as well as right to manufacture and sell the goods. For example, Coca-cola, Pepsi-cola, Guinness to mention a few.

Comparative illustrations on Legal protections over Franchisors and Franchisees

United States.

Both the Federal and State government now regulate franchise relationships. The regulations aim at protecting both the franchisors and the franchisees, particularly, in avoiding unfair terminations and unethical practices, like deceptive advertisement of franchise opportunities. For example, at the Federal level, there exist a Law protecting automobile and service station franchisees. The aim of the Law is to protect dealers from wrong practices, like terminations and unfair competition by their franchisors. Also, rules have been published by the U.S Federal Trade Commission which gives prospective franchisees more information. Franchisors are obliged to explain to franchisees provisions on termination of franchise agreements, cancellation and renewal. Franchisors are also legally obliged to disclose the number of franchisees they have terminated in the past year and the reasons for their actions. The FTC rules require inclusion of all restrictions in the franchise agreements. Representations made to prospective franchisees must be on 'reasonable basis'. Liability for violation of the rules is a civil penalty of \$10,000 per day. The FTC is also empowered by the rules to sue on behalf of franchisees who suffer injuries due to violations of the rules by franchisors.

The American judiciary has also responded proactively to the demands of interpreting franchises agreements in ensuring fairness and justice. The case of *Morley-Murphy Company V Zenith Electronics*⁹ Offers an illustration.

In that case, the Plaintiff served as a distributor of Zenith's consumer electronic products under a series of annual distributorship agreements. It had franchise relationship with Zenith for at least, 58 years. The company was apparently a very successful dealer, and in 1994, Zenith products accounted for 54 percent of Morley-Murphy's total business. Around that time, however, business was not smooth for Zenith. It had reported a net operating loss in 9 of the last 10 years prior to the events leading to this case. This dismal development inspired efforts at corporate recognition. One aspect of Zenith's business that came under the microscope was its distribution system. It formerly had relied principally on a network of independent distributors, like Morley-Murphy, who sold Zenith products to small specialised retailers and a few large department stores. However, since the mid-1980s, large discount consumer electronic retailers began to account for more and more sales. Many of these companies operated their own distribution centers and insisted on dealing directly with manufacturers. By 1994, Zenith's 15 remaining independent distributors sold only 20 percent of its product, and Zenith task force reported that the company could probably reap substantial savings if it converted to "one-step distribution", in which its products would be shipped directly from its factories to the retailers' warehouses. Zenith adopted this recommendation and informed Morley-Murphy that it would be formally terminated as a distributor. This notification did not suggest any way in which Morley-Murphy could "cure" the problem that lay behind the decision to terminate, and it did not identify any deficiency in Morley-Murphy's performance as a dealer. Further, Zenith never bothered to determine whether Morley-Murphy, standing alone, was a profitable dealer. Morley-Murphy sued Zenith, claiming the termination of its dealership violated the *Wisconsin Fair Dealership Law*. That statute prohibits the termination of a dealership agreement without good cause. It further defines good cause, in part, as "failure by a dealer to comply substantially with essential and reasonable requirements.... Which requirements are not discriminatory." Zenith argued that it did not violate

⁹ 142 F. 3d 373 (7th cir. 1998).

the statute because it terminated Morley-Murphy as part of a system wide, non-discriminatory change from two step to one-step distribution intended to stem overall losses and improve financial performance. Morley-Murphy claimed that the statute did not tolerate market withdrawal as a term that could be imposed for good cause.

The Court held that the Wisconsin statute permitted a franchisor to terminate a dealership agreement for the kind of reason Zenith offered. It held that a franchisor's economic circumstances may constitute good cause to alter its method of doing business with its dealers, but such changes must be essential, reasonable, and non-discriminatory. The court further held that the statute was meant to afford dealers substantial protections, previously unavailable at common law. However, that a franchisor may not terminate a dealer merely because it could make more money without that particular dealer. Instead, the need for change must be objectively ascertainable and the means used may not be disproportionate to the economic problems. What is essential and reasonable must be determined on a case-by-case basis. Further, that the dealer is also protected from discriminatory treatment. Thus, Zenith must show three things in order to justify the termination of Morley-Murphy; (1) an objectively ascertainable need for the termination; (2) that the termination is a proportionate response to that need; and (3) that the termination is non-discriminatory. The court accordingly, remanded the case to give Zenith an opportunity to prove that its particular circumstances qualified as good cause for the termination.

The European Union:

The European Union has responded positively to promulgation of Laws on distribution and commercial agency Laws. Both the legislative and Judicial organs have made vital contributions, particularly, in areas bothering on competition and franchising. The European Union and the Court of Justice have also been inspired by the United States Anti trust practice by applying the US rule of reason doctrine or restraints as evident in several decisions including the *Nutricia Judgement*¹⁰; *Pronuptia Judgement*¹¹; and the *Nungesser Judgement*¹² to mention a few.

¹⁰ [1985] ECR 2545;

¹¹ [1986] ECR 353

¹² [1982] ECR 2015

Some individual European Countries in their national Laws have also provided for the growth and development of franchising and licence agreements in their jurisdictions. Those who do not have national Laws on franchising have adopted the rules formulated by their Franchising Associations. These include, Germany, Spain, Greece, Belgium and France. France has adopted the rule formulated by the French Federation of Franchise (F.F.F.) while Italy has adopted the rules formulated by the *Associazione Italiana del Franchising*. Netherlands has adopted the Dutch Franchising Association's rules and recently, its Senate rejected a Bill concerning competition Law because of the fact that the Bill did not create a special position for all franchising agreements¹³. The countries' organisations also subscribe to the Europeans code of Ethics of the European Franchising Federation.

FRANCHISING: Wither Nigerian Law.

As pointed out earlier, Nigerian Law has focused specifically on direct protections of recognized forms of intellectual properties which include:

1. Copyright – as contained in the Copyright Act¹⁴ (as amended)
2. Trade Marks – as contained in the Trade Marks Act¹⁵ and the Regulations made pursuant to the Act.
3. Patents and Designs – as contained in Patents and Designs Act¹⁶ and Rules made and conventions entered into pursuant thereto.

Nigerian Law has also focused, although narrowly, and only *conceptually*, on the monitoring of transfer of technology. The use of the words '*narrowly and conceptually*' is deliberate as will be evident in the course of this paper. A Law must respond to the changing investment atmosphere, otherwise it will cease to have potency and will become only anachronistic and fit for the archives.

Regulation of technology transfers In Nigeria.

¹³ See M.R. Mok, 'Karterlrrecht 1 Nederland' Tjeank Willink (2 wolle, 1987) p103; m.j.c. derricks, 'Focus on franchising' Tv vs Nr. 87/3. p. 62 e.v.

¹⁴ Laws of the Federation of Nigeria, Cap 68

¹⁵ Laws of the Federation of Nigeria Cap 436; See also Merchandise marks Act, Laws of the Federation of Nigeria Cap 233.

¹⁶ Laws of the Federation of Nigeria, Cap 344

On September 24, 1979, the National Office of industrial property Act¹⁷ was promulgated. The Act established The National office of Industrial Property to monitor, on a continuing basis, the transfer of foreign property technology to Nigeria and to provide for other related matters. The detailed functions of the establishment are contained in section 4 of the Act which provides:

‘Subject to section 2(1) of this Act, the National Office shall carry out the following functions-

- (a) the encouragement of a more efficient process for the identification and selection of foreign technology;
- (b) the development of the negotiating skills of Nigerians with a view to ensuring the acquirement of the best contractual terms and conditions by Nigerian parties entering into any contract or agreement for the transfer of foreign technology;
- (c) the provision of a more efficient process for the adaptation of imported technology;
- (d) the registration of all contracts or agreements having effect in Nigeria on the date of the coming into force of this Act, and of all contracts and agreements hereafter entered into, for the transfer of foreign technology to Nigerian parties; and without prejudice to the generality of the foregoing, every such contract or agreement shall be so registrable if its purpose or intent is, in the opinion of the National Office, wholly or partially for or in connection with any of the following purposes, that is to say –
 - (i) the use of trade-marks,
 - (ii) the right to use patented inventions,

¹⁷

Laws of the Federation of Nigeria, Cap 268.

- (iii) the supply of technical expertise in the forms of the preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever,
- (iv) the supply of basic or detailed engineering,
- (v) the supply of machinery and plant, and
- (vi) the provision of operating staff or managerial assistance and the training of personnel; and
- (vii) the monitoring, on a continuous basis, of the execution of any contract or agreement registered pursuant to this Act

The effect of section 4(d) is that all contracts or agreements for the transfer of technology to a Nigerian entrepreneur must be registered with the National office of Industrial property. Thus, industrial franchise agreements must be registered with this government body in order to be legally recognized in Nigeria. If entered in Nigeria, section 5(1) requires registration with NOIP within six months. If entered into by any person in Nigeria with another person outside Nigeria, Section 5(2) demands registration within sixty days of the conclusion or execution of the contract.¹⁸

Section 6 contain some Limitations likely to hamper the efficient growth of trade and investment through franchising and all other forms of technology transfer.

Technology freely available in Nigeria

Under Section 6(2), the Director of NOIP is obliged not to register any contract or agreement:

“(a) Where its purpose is the transfer of technology freely available in Nigeria.”

¹⁸

See Sections 5(3), and 6 for the procedure on registration.

The above provision is inconsistent with an essential element in the transfer mechanism and may inhibit growth in Nigeria. It neglects the vital feature that 'goodwill' rather than availability ought to be emphasized. For example, the fact that several companies have mastered the process of manufacturing of fast foods in Nigeria ought not to be a reason to exclude a Nigerian entrepreneur from entering into an alliance to bring McDonald's into Nigeria.

Price not commensurate with technology

Secondly, under Section 6(2)(b), the Director of NOIP shall not register any technology transfer:

'where the price or other valuable consideration is not commensurate with the technology acquired or to be acquired'.

It is unrealistic to measure the value of technology at the embryonic stages of the relationship. Since most arrangements in this respect are long term in duration, this ought to be left to the prudence of the parties – an anomaly that may be cured by a Nigerian entrepreneur having a good business plan before entering into the relationship.

Foreign Arbitration/Jurisdiction

Further, Section 6(r) of the NOIP Act must be criticized. The Director of NOIP is obliged by Law not to register any agreement for technology transfer:

'where the transferee is obliged to submit to foreign jurisdiction in any controversy arising for decision concerning the interpretation or enforcement in Nigeria of any such contract or agreement or any provisions thereof'

As has been observed elsewhere¹⁹, experience has shown that investors have raised the fairness of this provision. It may be contended that unless the transferee's business is substantial, he may not afford the cost of arbitration or litigation outside Nigeria. However, it is submitted that where parties voluntarily agree to be bound by foreign jurisdiction the Law should have no business except on grounds of public Policy to prohibit external arbitration. The Legislature is called upon to have another look at the above sub Sections of Sections 6 NOIP Act.

It is further submitted that alternative dispute resolution mechanism should be encouraged amongst parties seeking to create binding alliances. This is now well developed and largely used in the United States. One of the advantages of strategic alliance is the opportunity to learn from other systems. Although Nigeria's Arbitration and Conciliation Act contain a unified legal framework for the fair and efficient settlement of commercial disputes by arbitration and conciliation and also makes applicable to Nigeria the Convention on Recognition And Enforcement of Arbitral Awards (New York convention) to any award made in Nigeria or in any contracting state arising out of international commercial arbitration, the fact is that the litigation psychosis remain alive in most parties. Often times, objections are taken to court over 'small points' that could be resolved amongst parties. Often times, the intention may be to tie up the matter with the recognized inherent delays in Nigeria's court system. This attitude must change to ensure fairness amongst strategic alliances.

Despite the congestion and delays in courts, Nigeria's Court of Appeal and Supreme Court must be commended in deciding or interpreting several cases on arbitration in ways conforming with international standards. Decisions of these courts abounds²⁰.

Dearth of Judicial Authorities in Nigeria on Franchising

¹⁹ See J.U.K. Igwe, The Legal Processes and Factors Involved in creating Binding But Fair Strategic Alliances In International Business (Focus on U.S and Sub Saharan Africa) paper presented at the Strategic Alliance Seminar Organised by the United States Commercial Service for Entrepreneurs and in Kaduna, Nigeria on Thursday October 24, 2002

²⁰ See for example the recent decision of the Supreme Court of Nigeria in *S. A. Savoia Ltd V Sonubi* (2002)7 SC (part 1)36.

The absence of statutory progress in Nigeria in this aspect is further compounded by the dearth of judicial authorities on franchises in Nigeria. A close attempt was made in Union Beverages Ltd V Pepsi Cola International Ltd & 3 ors²¹.

The case arose out of a franchise agreement. Unfortunately, the case focused on the competence of the action itself, the question of order of parties and interlocutory injunction.

The Supreme Court held that the alleged franchise agreements showed that the first Respondent was not a party to them. The first Respondent could not purport to terminate them on any ground because generally only parties to a contract can enforce it. A person who is not a party to it cannot do so even if the contract was made for his benefit and purports to give right to sue upon it²².

Checklist of items/requirements in using franchising as means of practicalising strategic alliances

1. Franchise application form
2. Accompanying letter
3. Confidentiality agreement
4. Prospectus/Business Plan
5. Franchise agreement
6. 'Directors' and 'shareholders' undertakings
7. Deed of guarantee
8. Manual
9. Brochure

10. Letter to the NOIP (Nigeria)

²¹ [1994]3 NWLR. (Part) 1. S.C. Note: *J. U. K. Igwe was led in that case by F.R.A. Williams SAN for the Respondents at the Supreme Court of Nigeria, see P. 9 of the judgement.*

²² Supra at p. 16

Procedures.

1. Receipt of inquiry from prospective franchisee.
2. Initial telephone response from franchisor, establishing personal contact. No information disclosed.
3. Dispatch of franchise application form and accompanying letter together with franchise brochure.
4. Receipt of completed form from franchisee followed by assessment of information disclosed by replies.
5. If replies indicate that the applicant is unsuitable, personal contact again to discontinue process of evaluation in the nicest possible manner.
6. If replies indicate that applicant is worth investigating further, personal contact again to arrange interview and visits to outlets owned by franchisor.
7. Interviews with franchisor's assessment panel, including franchise manager, property specialist, sales manager and technical manager (this applies to a retail product franchise but any franchise will need to have each serious prospective franchisee vetted by each important division of the franchisor)
8. Establishment of franchisee's financing requirements.
9. Exchange of confidentiality agreement and payment of deposit. The deposit is non-refundable and will form part of the initial franchise fee, if the franchise purchase agreement is exchanged.
10. Disclosure by franchisor of confidential information to enable franchisee to prepare business plan. Issue of franchise documentation.
11. Introduction of franchisee to funding sources.
12. Evaluation of available properties in the proposed territory.

13. When sufficient funding is available to the franchisee, the franchise purchase agreement may be exchanged and the balance of the franchise fee paid to the franchisor by the franchisee.
14. If the franchise business requires a property, it should now be acquired by the franchisor (conditional upon any necessary planning consent) and a lease or sublease agreed with the franchisee. The franchisee will work with the franchisor to convert the property to the house style of the franchise. An application for any necessary planning consent should be made.
15. The franchisee will attend training.
16. If the franchisee passes his training and is judged suitable by the franchisor, the franchise agreement will become effective on completion of the conversion of the property.

Caution: need For a Lawyer in Negotiating and drafting franchise documents.

The above is a mere guide.

Entrepreneurs should involve a legal expert knowledgeable in International Business Law right from the stage of the inquiry/identification of a franchise partner to the technical processes of negotiation and to the conclusion of the franchise agreement.

The franchise application form, the accompanying letter, the confidentiality agreement, the franchise agreement, undertakings, Deed of guarantee to mention a few are all documents to be subjected to Legal reasoning and prudence before exchange of contract. More so, some provisions of the franchise agreement are restrictive in nature since the essential characteristics of franchise agreement include the conferment of exclusivity, Licence of trademark, a right to utilise franchisor's signs, assistance and know-how. In the case of ***Commercial Plastics Vs Vincent***²³, the Court held:

‘The decision of this case against the plaintiffs is inevitable, but it is in a way regrettable, because the plaintiffs’ case has underlying merits. They do seem to have important confidential information, for which they might reasonably claim protection by a suitably limited restriction provision. The actual provision in this case can be described as ‘home-made’, that is, not professionally drafted. It is unfortunate that a home-made provision, offered and accepted in good faith between commercial men and not in the least intended to be oppressive, must be ruled out and declared void in a court of Law for lack of the necessary limiting word. It would seem that a good deal of legal ‘know-how’ is required for the successful drafting of a restrictive covenant’²⁴.

Beyond Legal Mechanisms to Other Factors Likely to Affect Strategic Alliances through franchising.

Avoiding unethical trade practices.

To build a binding but fair strategic alliance, no party should be involved with unethical trade practices.

These include:

- (i) Obtaining by false pretences otherwise referred to as ‘419’;
and
- (ii) Other economic crimes.

The white-collar fraud popularly called 419 is a factor that may inhibit successful strategic alliances. It is a problem that must be fought both on part of the party who makes the illicit proposal and the party who want to reap where he never sowed.

²⁴ [1965] 1 QB 623, at p. 647, lines C-E

Effective Corporate Governance as a factor likely to foster franchising relationship²⁵

Good Corporate Governance of the entities/enterprises intending to enter into franchise relationships will enhance their alliances. Corporate governance refers to the private and public institutions, including laws, regulations and accepted business practices, which altogether govern the relationship, in a market economy, between corporate managers and entrepreneurs ('Corporate insiders') on the one hand and those who invest resources on the other hand. Investors of course, include, suppliers of equity finance (shareholders), suppliers of debt finance (creditors), suppliers of relatively firm – specific human capital (employees) and suppliers of other tangible and intangible assets that corporations may use and grow.

The OECD principles on corporate Governance include:

- (i) The rights of shareholders that corporate governance framework should protect shareholder's rights.
- (ii) Equitable treatment of shareholders (minority and foreign shareholders inclusive)
- (iii) Should recognize the rights of stakeholders and encourage active co-operation.
- (iv) Disclosure and transparency;
- (v) Should ensure strategic guidance of the company, the effective monitoring of management by the board and the board's accountability to the company and shareholders involved in strategic alliance.

Need to ensure conducive Investment atmosphere in Nigeria and effective Policy processes that engender confidence on Investors and general conclusions

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For a detailed discussion on Corporate Governance See J.U.K Igwe, Building good Corporate Governance To Enhance Global Competitiveness, Strategic Alliances In International Business

Strategic alliances through franchising will be mostly between foreign enterprises and Nigerian entrepreneurs, there is the need for entrepreneurs in Nigeria to insist that investment atmosphere in Nigeria must be conducive to attract their foreign counterparts.²⁶ An American franchisor, for example, will not waste his valuable investments in terms of licensing, conferment of exclusivity, assistance and technical know-how if he realises that based on Nigerian Laws, he would be hindered from repatriating returns on his investment. The same reasoning will apply if he realises that the country is political unstable and socially at risk.

Laws on Foreign Investment²⁷

The Nigerian Government's effort in promulgating the following Laws must be praised:

1. Nigerian Investment Promotion Commission Decree 1995²⁸
2. Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree 1995²⁹.

Particularly, Sections 22, 23 and 24 of the NIPC Act provide for incentives for special investment, investment guarantees, transfer of capital, profits and dividends. Section 15 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree 1995 provides for investment of foreign currencies and capital in enterprises or securities in Nigeria. The provisions are commendable.

Beyond these commendable legislations, what other factors would enhance the requisite conducive environment for foreign and local investment to thrive.

²⁶ For detailed discussions on these aspects, see J. U. K. Igwe, *Business-Government Relations In Nigeria 1854-2003, Policies, Laws and Institutional Frameworks*, 2000. See Particularly, chapter 11 at pp. 200-254 on; "Current Legal and Institutional Frameworks for Foreign direct Investment in Nigeria; and Chapter 1 on 'Business, Government and Public policy Process' at P. 2-9.

²⁷ See J. U. K. Igwe, *Supra*.

²⁸ Decree number 11 of 1995

²⁹ Decree number 17 of 1995

It is submitted, as was done elsewhere³⁰ that a stable political environment is pivotal. The emphasis lies on a stable polity as a necessary condition for foreign investment to thrive in all spheres of the economy. In late 1998 after the Military announced a programme for return of democracy in Nigeria, a financial Analyst with Solomon Smith Barney, new York based Investment House was quoted as saying:

‘when over-all conditions eventually settle down, Nigeria’s political and economic fundamentals will again come of importance in assessing the country’s effective credit risk....’³¹

Nigerians must strive to nurture democracy and ensure its sustenance. Nigerians must strive to live together in peace. No sustainable development or investment whether through franchising or any other can germinate in an atmosphere of lawlessness, uncertainty, religious or ethnic disturbances and dictatorship of any form. The emphasis lies on stable and corrupt-free polity as necessary conditions for trade and investment to flourish in all spheres of the economy. As observed elsewhere³², research³³ has shown that political stability is one of the prominent variables found to be statistically significant in influencing investment flows.

Research³⁴ has also shown that there is a statistical association between proxies market demand levels or market growth rates of host economies and inflows of foreign investment. Thus, the growth, size and sanity of the host country’s market is one of the dominant influences on foreign investment. In the United States of America, due to the growth and expansion of U.S franchisors during the past 20 years, franchisors are now warned, more than

³⁰ See J. U. K. Igwe, Business-Government Relations in Nigeria PP. 251-252.

³¹ See the Guardian, August 30, 1998, p.1

³² J. U. K. Igwe, Business-Government Relations in Nigeria, P. 252

³³ F.R. Root and A. A. Ahmed, ‘The influence of Policy instruments on Manufacturing Direct Investments in Developing Countries, Journal of International Business Studies 1978, pp. 81-83; See also, root and Ahmed, ‘Empirical Determinants of Manufacturing Direct Foreign Investments in Developing Countries, Economic Development and Cultural change, Journal of International Business Studies, vol. 27, July 1979, pp. 751-767.

³⁴ J. H. Dunning, Determinant of International Production, Oxford Economic Papers, volume 25, November 1973.

ever before to carefully investigate the target market, looking for signs of political and economic instability³⁵

Thus, the government must strive to reduce the rate of inflation and generally, improve the state of the economy. Governments at all levels must put into action their promises of rehabilitating infrastructures: Improved Power and water supply necessary for industries to operate, improved transport systems and roads. A Nigerian entrepreneur who obtains a distributorship franchise involving distribution of goods to remote areas may be hampered for example, by the state of the road networks, particularly, to the rural areas. The public and private sectors – all citizens should co-operate in fighting those economic and political factors that hamper the growth of the economy and by implication, the growth and expansion of trade and investment. This is the best time for action!!

J. U. K. IGWE

³⁵

See 'Franchising Overseas' in Barnes, Dworkin and Richards, 'Law for Business' Irwin McGraw-Hill, 7th ed. 2000, pp. 430-431